IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY,	)	
Plaintiff,	)	
	)	**Case No. 1:16-cv-1485**
v.	)	
	)	
JESSICA ANNE FRARACCIO,	)	
	)	
and		
JENNIFER P. NEALEY AND MICHAEL A. NEALEY, Administrators of the Estate and Personal Representatives of Elijah Nealey, deceased		
Defendants.		

ORDER

This dispute arises from the death of a child who at the time was committed to the care of an insured. At issue on summary judgment is whether the death of the child was a covered "occurrence" under the insurance policy or whether the policy's exclusions for intentional acts and physical abuse operate to exclude coverage where, as here, the insured caused the death of the child, and pled guilty to felony child abuse and felony murder under Virginia law. The insurer, Nationwide, seeks a declaration that the policy's exclusions bar coverage to the insured, arguing (i) that the death of the child is not a covered "occurrence" within the meaning of the Policy because the death of the child was intentional, not accidental, and (ii) because the insured pled guilty to two Virginia crimes related to the death of the child, the doctrine of judicial estoppel bars the insured from contending that the death of the child was accidental.

As the matter has now been fully briefed and argued, it is now ripe for disposition. For the reasons that follow, the record reflects that there are issues of material fact that preclude summary judgment.

I.

Plaintiff, Nationwide Property & Casualty Insurance Company ("Nationwide") is an Ohio corporation with its principal place of business in Ohio. Nationwide issued the homeowners policy (the "Policy") at issue in this case to Paul Fraraccio, a resident of Virginia and the named insured, for the period of May 24, 2012 to May 24, 2013. Nationwide has brought this action seeking a declaration regarding coverage for claims and causes of action arising out of a civil wrongful death action for the death of Elijah Nealey brought by defendants Jennifer and Michael Nealey in Circuit Court for Prince William County, Virginia.

The parties agree that defendant Jessica Anne Fraraccio ("Fraraccio"), Paul Fraraccio's daughter, qualifies as an insured under the policy. Fraraccio is currently incarcerated at the Fluvanna Correctional Center for Women in Fluvanna County, Virginia, as she pled guilty to felony child abuse and felony murder under Virginia law for the death of Elijah Nealey, an infant that had been committed to Fraraccio's care. Guardians *ad litem* represent Fraraccio in this declaratory judgment action and in the state court wrongful death action because she is currently incarcerated. Va. Code § 8.01-9 (providing for appointment of guardians ad litem for persons under disability).

Defendants Jennifer and Michael Nealey (the "Nealeys") are Elijah's parents and administrators of Elijah's estate. In that capacity, they brought an underlying wrongful death action against Fraraccio now pending in the Circuit Court of Prince William County. *See Nealey v. Fraraccio*, CL14005429-00, (Prince William Cnty. Cir. Aug. 6, 2014). The complaint in the wrongful death suit alleges that Fraraccio negligently caused Elijah Nealey's death.

The events underlying this dispute stem from the death of 23-month old Elijah Nealey while in the care of Jessica Anne Fraraccio. Fraraccio is the only available eyewitness to the events which led to Elijah's death on August 22, 2012. That morning, while Fraraccio was babysitting Elijah, Fraraccio made Elijah's lunch and then became frustrated when Elijah made a mess at lunch. Fraraccio pulled Elijah's chair out from the table causing Elijah to bump his head on the table and then again when he fell to the floor.[1] Because he bumped his head on the table and fell to the floor, Elijah began to cry. Fraraccio testified that she then held Elijah in her arms, rocking him, and apologizing to him for causing him to bump his head. Fraraccio claims she does not know how long she held Elijah, but at some point she noticed that he had stopped breathing. At that point she called 911 for help, but it was too late; Elijah had already died.

On October 21, 2013, Fraraccio pled guilty before the Circuit Court of Prince William County, Virginia to felony abuse causing serious injury to the life or health of a minor, under Va. Code § 18.2-371.1, and to felony murder of Elijah under Va. Code § 18.2-33. The record confirms that Fraraccio pled guilty freely and willingly.[2] In the course of the plea hearing, Fraraccio was not required to allocute or explain what had happened to Elijah on the day of his death.[3] In January 2014, Fraraccio was sentenced to forty years for the felony murder conviction and a consecutive ten-year sentence for the child abuse conviction, for a total of fifty years of incarceration, although forty-five years of that sentence were suspended.

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[1] The parties strongly dispute how to characterize these actions. Nationwide alleges that Fraraccio pulled the chair out from under Elijah intending that he hit his head and fall to the ground, whereas defendants allege the events were accidental.

[2] It appears that Fraraccio did not allocute at sentencing or explain the events that led to Elijah's death.

[3] In certain courts, as here, pleading defendants are required to state specifically, in their own words, what they did, a requirement that ensures that guilty pleas are not accepted unless the defendant actually did what he or she is pleading guilty to. These courts, as here, do not typically accept so-called *Alford* or *nolo contendere* pleas. *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (holding that a criminal defendant could voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.").

In April 2014, the Circuit Court of Prince William County appointed the Nealeys as the administrators of Elijah's estate. Then, in August 2014, the Nealeys filed a wrongful death action against Fraraccio, alleging that Fraraccio negligently caused Elijah's death. The Nealeys seek $4,000,000 in compensatory damages against Fraraccio.

Fraraccio notified Nationwide of the state court wrongful death action, seeking coverage under the Policy. The Policy's personal liability coverage provision states that Nationwide will defend the insured and "will pay damages an insured is legally obligated to pay due to an occurrence." The Policy defines an "occurrence" as a death or bodily injury resulting from an "accident." The Policy also includes two coverage exclusions:

i. an exclusion barring liability for bodily injury "caused intentionally by or at the direction of the insured, including willful acts the result of which the insured knowns or ought to know will follow from the insured's conduct," and

ii. an exclusion barring coverage for injury that "result[s] from acts or omissions relating directly or indirectly to" physical abuse.

Nationwide filed this declaratory judgment action to resolve whether the Policy requires Nationwide to defend and indemnify Fraraccio in the wrongful death action. Nationwide argues that the Policy does not cover Fraraccio because (i) Elijah's death was not accidental and therefore was not an "occurrence" within the meaning of the Policy, (ii) that the exclusion for intentional acts applies because Elijah's death was a result of Fraraccio's willful acts, and (iii) the exclusion for physical abuse applies because Fraraccio admitted to having abused Elijah.

II.

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a), Fed. R. Civ. P. A "fact is material if it might affect the outcome of the suit under the governing law." *Vannoy v. Fed. Reserve Bank of Richmond*, 827 F.3d 296, 300 (4th Cir. 2016) (internal quotation marks omitted). A "dispute is genuine if a reasonable jury could return a verdict for the nonmoving party." *Id.* (internal quotation marks omitted). The movant bears the burden of showing an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the movant meets this burden, the non-moving party, to defeat the motion, must set forth specific facts showing that there is a genuine issue for trial. *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 436 (4th Cir. 2007). Facts must be construed "in the light most favorable" to the non-movant, and all reasonable inferences must be drawn in the non-movant's favor. *Vannoy*, 827 F.3d at 300. Only "disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III.

Analysis of the question presented properly begins with Nationwide's argument that the Policy does not apply because Elijah's death was not an "occurrence" within the meaning of the Policy. Specifically, Nationwide contends that Fraraccio intentionally caused Elijah's death and therefore does not qualify as an occurrence. Defendants argue that Elijah's death was accidental, and hence qualifies as an "occurrence" within the meaning of the Policy.

The parties' dispute in this regard depends on the meaning of the Policy term "occurrence." As it happens, this is a frequently litigated issue in insurance coverage cases, and the Supreme Court of Virginia has held that the terms "occurrence" and "accident" are "synonymous and . . .

refer to an incident that was unexpected from the viewpoint of the insured." *Utica Mut. Ins. Co. v. Travelers Indem. Co.*, 223 Va. 145, 147 (Va. 1982).[4] The Supreme Court of Virginia has further defined "accident" as "an event which creates an effect which is not the natural or probable consequence of the means employed and is not intended, designed, or reasonably anticipated." *AES Corp. v. Steadfast Ins. Co.*, 283 Va. 609, 617-18 (Va. 2011). As that court noted, for coverage to be precluded "it must be alleged that the insured subjectively intended or anticipated the result of its intentional act or that objectively, the result was the natural or probable consequence of the intentional act." *Id.*

Putting to one side for the moment the application of the doctrine of judicial estoppel, the current record appears to reflect a genuine dispute of material facts over whether Elijah's wrongful death was an "occurrence" covered under the Policy. To qualify as an "occurrence" or accident, the death must have been the natural or probable consequence of Fraraccio's intentional actions. On this record, however, there is a factual dispute over what actions Fraraccio took and whether those acts were intentional. First, the parties disagree about what motivated Fraraccio's actions. Nationwide alleges that Fraraccio acted out of frustration with Elijah and meant to cause him harm. In contrast, the defendants argue that Fraraccio was not frustrated with Elijah on that day and support that contention with Fraraccio's deposition testimony.[5] Second, although Fraraccio admits to holding Elijah tightly and rocking him back and forth, she denies having intended to suffocate him. This, she claims, happened accidentally.

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[4] *See also Greystone Const., Inc. v. National Fire & Marine Ins. Co.*, 661 F.3d 1272, 1278 (10th Cir. 2011) ("[a]n occurrence is defined as an accident . . . an accident is an unanticipated or unusual result from a commonplace cause."); *Mid-Century Insurance Co. of Texas v. Lindsey*, 997 S.W.2d 153, 155 (Tex. 1999) ("[A]n injury is accidental if from the viewpoint of the insured, it is not the natural and probable consequence of the action or occurrence which produced the injury").

[5] *See* Fraraccio Dep. 42/2 (June 19, 2017) ("I wasn't frustrated with [Elijah].")

The record facts establish that after Fraraccio picked Elijah up from the floor where he had fallen, she held him tightly, rocked him and, she claims, apologized to Elijah for bumping his head. She testified in her deposition that she did not realize she was suffocating him and was not sure how long she held Elijah. Notably, Fraraccio admits in her deposition to having "had" her hand over Elijah's nose and mouth while she was rocking him, but she disputes that she intentionally placed her hand there or that she was even aware of where she had placed her hand. The parties, therefore, dispute whether Fraraccio's intended to harm Elijah or cause his death. In sum, there is a factual dispute over whether the incident was a covered accident or "occurrence" under the Policy or whether Elijah's death was the result of an intentional act.

III.

Nationwide argues that there is no factual dispute because Fraraccio, having pled guilty to felony child abuse and felony-murder cannot claim her actions were accidental. More specifically, Nationwide argues that the doctrine of judicial estoppel[6] bars Fraraccio from claiming the incident was an accident. This is so, in Nationwide's view, because the crime of felony child abuse requires "an intent to injure or action with knowledge or consciousness that a child would be injured as a likely result of the act[,]" Va. Code § 18.2-371.1. It follows from Nationwide's argument that Fraraccio's plea is an admission to a non-accidental act that she should now be estopped from denying. Defendants, in response, argue that Fraraccio's positions on the facts and circumstances leading to the death of Elijah are consistent because she has always claimed that Elijah's death was an accident.

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[6] Collateral estoppel, though seemingly applicable, does not apply in this case. In determining the preclusive effect of a state-court judgment, the federal courts must, as a matter of full faith and credit, apply the forum state's law of collateral estoppel. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481–82 (1982). Because Virginia is the forum state, Virginia's law of collateral estoppel applies. Under Virginia law, collateral estoppel requires that the parties in the previous case be the same as those in the present one. *Norfolk Western Ry. Co. v. Bailey*, 221 Va. 638, 640 (Va. 1980). Because Nationwide was not a party to the previous criminal case, it cannot assert collateral estoppel here. *See Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 265 (Va. 1987) (holding that collateral estoppel did not apply where a defendant was convicted of unlawful wounding and then argued that he had not acted intentionally in a subsequent civil insurance suit).

Judicial estoppel is a doctrine precluding a party from advancing "a factual assertion that is inconsistent with a position sworn to and benefitted from in an earlier proceeding." *Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996) (*quoting* Mark J. Plumer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409, 435 (1987)). As the Fourth Circuit put it, the doctrine "precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation" and its purpose is to "prevent a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process." *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 2829 (4th Cir. 1995). According to the Fourth Circuit, there are three elements that must be met before a court can apply judicial estoppel. First, "the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance in prior litigation." *Lowery*, 92 F.3d at 224. Second, the prior inconsistent statement must have been accepted by the court. Third, the party must have "intentionally misled the court to gain unfair advantage." *Id.* As to the relative weight of these factors, the Fourth Circuit has held that the third factor is the "determinative factor." *Id.* Additionally, because of the "harsh results attendant with precluding a party from asserting a position that would normally be available to the party, judicial estoppel must be applied with caution. *Id*.

The question, therefore, is whether judicial estoppel applies in these circumstances. Three cases arising in the Fourth Circuit inform the resolution of this question. In the first case, *Lowery v. Stovall*, a plaintiff who pled guilty to resisting arrest sued a police officer under 42 U.S.C. § 1983 for use of excessive force in violation of his Fourth Amendment rights. 92 F.3d at 222. The Fourth Circuit applied judicial estoppel, finding that the plaintiff's statements in his plea colloquy contradicted the allegations in the plaintiff's complaint that "he did not attack" the arresting officer and was shot "without reason." *Id.* at 224. Plaintiff's statements had been accepted by the state court as part of his plea, and plaintiff had received a significant sentencing reduction in exchange for his plea. *Id.* Based on these facts, the Fourth Circuit held that plaintiff's "arguments are nothing more than an intentional attempt to mislead the district court and this court to gain unfair advantage in this action" and judicial estoppel barred his claims. *Id*.

In *Zinkand v. Brown*, 478 F.3d 634 (2007), the Fourth Circuit addressed a similar case but reached the opposite result. In *Zinkand,* the plaintiff brought a § 1983 action against a police officer for the officer's alleged use of excessive force in effecting an arrest. In the previous state prosecution, plaintiff entered an *Alford* plea[7] to the charge of resisting arrest, but did not specifically admit to resisting arrest. The Fourth Circuit concluded that the doctrine of judicial estoppel did not apply because plaintiff's position in his *Alford* plea and his § 1983 action had remained consistent — he did not admit to resisting arrest and was not acting in bad faith because he had received no benefit, such as a reduced sentence, from his plea. *Id.*

In the third case, *Wolfe v. Footen,* 418 Fed.Appx. 256 (4th Cir. 2011), a plaintiff pled guilty to a number of charges including an assault on one of the officers who arrested him. Because the state plea colloquy in *Wolfe* did not "include any explicit acknowledgement by [Wolfe] that he considered himself guilty of the crimes[,]" the Fourth Circuit concluded that the guilty plea alone did not justify application of judicial estoppel because there was insufficient evidence to demonstrate that the plea was inconsistent or that the allegations in the plaintiff's civil suit were made in bad faith. *Id.* at 260.

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[7] The plea was entered in accord with *North Carolina v. Alford,* 400 U.S. 25 (1970), a case in which the Supreme Court held that a criminal defendant could "voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.* at 37.

The first and second elements of judicial estoppel are present in this case. Fraraccio pled guilty to felony child abuse and neglect resulting in serious injury, Va. Code § 218.2.371.1(A), which requires that "by willful act or willful omission or refusal to provide any necessary care for the child's health [the person] causes or permits serious injury to the life or health of such child."[8] As she pled guilty to willful abuse of Elijah and is now asserting that she did not intentionally abuse him, there is an inconsistency as required by the first element of judicial estoppel. The defendants' contention that Fraraccio could have pled either to a "willful omission" or "refusal to provide necessary care" is not credible on the facts of this case, since neither of those is consistent on this record with the account of how Elijah was suffocated. With respect to the second element, — that the prior position was accepted by the court — it is undisputed that Fraraccio's assertions were accepted by the court through her guilty plea. *Lowery*, 92 F.3d at 225.

The more challenging question is whether Fraraccio "intentionally misled the court to gain unfair advantage" in asserting her factually inconsistent positions or if her inconsistent positions were "based on inadvertence or mistake." *Id.* at 224. Unlike in *Lowery*, Fraraccio did not receive a sentencing recommendation from the prosecution in exchange for her guilty pleas. [9] Thus, it is not clear that Fraraccio received a benefit from her plea, as required by binding Fourth Circuit precedent. The lack of a benefit, such as a sentencing reduction, was one of the factors that the Fourth Circuit in *Zinkand* said distinguished *Zinkand* from *Lowery*. Nationwide correctly points out that a plea bargain always provides some kind of benefit to a criminal defendant. Specifically, Nationwide contends that in this case Fraraccio may have been seeking to avoid a jury trial. But the

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[8] Because felony murder in Virginia is defined as "the killing of one accidentally, contrary to the intention of the parties, while in the prosecution of some felonious act," Va. Code § 218.2-33, Fraraccio's claim that she did not intend to kill Elijah is consistent with her guilty plea to felony murder. Therefore, Nationwide does not argue that Fraraccio's plea to felony murder estops her from now asserting that Elijah's death was caused accidentally.

[9] Fraraccio ultimately received a suspended sentence from the judge, but nothing in the current record connects that suspended sentence to her agreement to plead guilty.

Fourth Circuit requires more than the simple existence of a plea to support a finding of bad faith; a criminal defendant must receive a sentencing reduction in order to support a finding of bad faith. *See Lowery*, 92 F.3d at 224.

Further, there is little evidence to support that Fraraccio's inconsistent positions with respect to her child abuse plea and her current explanation were asserted in bad faith. In fact, Fraraccio says that she believed that her felony murder plea meant only "that [she] had acted in a way that resulted in a death, not necessarily that [she] had intentionally committed murder[,]" and that because of her felony murder plea she had not admitted to intentionally harming Elijah. Fraraccio Dep. 28/6-9, (June 19, 2017). Without the receipt of a benefit in the prior adjudication or evidence of a bad faith intention to deceive the court, Fraraccio's inconsistent position with respect to the abuse plea does not warrant application of judicial estoppel.

IV.

Nationwide's next argument is that the Policy's exclusion for willful and intentional acts bars coverage for Fraraccio. Defendants again argue that Elijah's death was an unintended accident, and therefore not intentional or willful.

Analysis properly begins with the terms of the Policy and their meaning. The Policy excludes coverage for bodily injury "caused intentionally by or at the direction of an insured, including willful acts the result of which the insured knows or ought to know will follow from the insured's conduct." Compl. Ex. 1 at H1. The Supreme Court of Virginia, in interpreting similar provisions, has held that they preclude coverage for incidents that are alleged to have been done intentionally. *See Travelers Indem. Co. v. Obenshain*, 219 Va. 44, 245 S.E.2d 247, 249 (1978) (entering judgment for insurer where the claims against the insured alleged intentional torts)[10]. As such, the same factual disputes over whether Elijah's death was intentional or accidental preclude summary judgment under the intentional acts exclusion. The parties are in dispute over whether she acted with intent to harm Elijah, knowing that harm was the probable consequence of her acts, or merely accidentally caused Elijah's death.

V.

Nationwide's final argument in favor of summary judgment is that Fraraccio's actions are excluded from the Policy's coverage by the physical abuse exclusion. Specifically, Nationwide argues that there can be no dispute that Fraraccio's actions constituted physical abuse of Elijah and hence the exclusion applies. Defendants respond that physical abuse does not include accidental harm where there was no indication that the actions taken were likely to result in injury, and that Fraraccio's holding and rocking Elijah was not abuse, but was merely negligent.

Analysis properly begins with the terms of the abuse exclusion in the Policy which provides that coverage does not apply to bodily injury "resulting from acts or omissions relating directly or indirectly to sexual molestation, physical or mental abuse, harassment, including sexual harassment, whether actual, alleged, or threatened." Compl. Ex. 1 at H2. Although Virginia courts have not addressed the meaning of a physical abuse exclusion in an insurance policy, the Supreme Court of Virginia has provided guidance on the interpretation of insurance contracts generally. In Virginia, insurance policies are interpreted "like other contracts, in accordance with the intention of the parties gleaned from the words they have used in the document." *Transcon Ins. Co. v. RBMW, Inc.*,

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[10] *See also Norman v. Ins. Co. of N. Am.*, 218 Va. 718 (Va. 1978) (finding that where "[a] malicious and intentional assault was alleged, not a wantonly negligent act resulting in an assault and battery," the intentional acts exclusion precluded coverage for the insured); *Town Crier, Inc. v. Hume*, 721 F.Supp. 99, 104 (E.D.Va. 1989) (holding that "all claims in the state complaint seek relief only for injuries caused either knowingly or intentionally by the Insureds, or for injuries caused by a violation of a statute," and that "[a]s such these claims are excluded from policy coverage").

262 Va. 502, 512 (Va. 2001). As a starting point, courts should "give the language its plain and ordinary meaning and enforce the policy as written." *Seabulk Offshore, Ltd. v. American Home Assur. Co.*, 377 F.3d 408, 419 (4th Cir.2004).

Abuse is generally taken to mean "physical maltreatment" or "cruelty that causes harm to another." Webster's III Dictionary 4 (3d ed. 2005); Black's Law Dictionary 10 (9th ed. 2009). The Code of Virginia states that "[p]hysical abuse occurs when a caretaker creates or inflicts, threatens to create or inflict, or allowed to be created or inflicted upon a child a physical injury by other than accidental means." Va. Code § 63.2-100; *see also* 22 VAC 40-705-30 A (Virginia Administrative Code definition). Thus, to qualify as "physical abuse," injury must be caused by non-accidental means. Other courts that have addressed physical abuse exclusions in insurance policies have reached similar results, requiring that harm be inflicted intentionally to qualify as "abuse" as opposed to by neglect or accident. *See Safeco Ins. Co. of Am., v. Vecsey*, No. 3:08CV833 JBA, 2010 WL 3925126, 10 (D. Conn. Sept. 30, 2010) (holding that throwing a carrot at a person was "physical abuse" within the meaning of an abuse policy because physical harm was the natural and probable consequence of the act).[11]

Because "physical abuse" as used in the policy requires non-accidental infliction of physical injury, there is a genuine dispute of material fact about the circumstances surrounding Elijah's death and whether those circumstances constituted "physical abuse." Defendants argue that Elijah's death was not the result of an intentional action to harm him, but instead occurred accidentally while Fraraccio was attempting to comfort Elijah. Nationwide present facts showing that Fraraccio may have intentionally harmed Elijah, as described above. Because there is a dispute over the facts resulting in Elijah's death, and whether it occurred as a result of non-accidental means, there is a dispute over whether Fraraccio physically abused Elijah. As such, summary judgment cannot be granted on the basis of the physical abuse exclusion.

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[11] *See also Merrimack Mut. Ins. Co. v. Ramsey*, 117 Conn.App. 769, 772-73 (Conn. App. 2009) (holding that stabbing by an insured was "clearly" physical abuse), *Kemper Ind. Ins. Co. v. Tarzia*, No. 3:11CV294 JCH, 2012 WL 2327703 (D. Conn. 2012) (holding that actions in self-defense were not physical abuse within the meaning of an exclusion because they are societally approved and do not qualify as maltreatment even though the acts were intentional).

In sum, there are genuinely disputed issues of material fact that preclude summary judgment in this case. Specifically, there is a dispute about exactly what Fraraccio did to Elijah to cause his death, and whether Fraraccio's actions were intentional. Therefore, the jury will be required to decide the following three factual questions:

i. Has Nationwide proved by a preponderance of the evidence that Fraraccio caused harm to Elijah non-accidentally and knew that his death was the natural or probable consequence of her actions,

ii. Has Nationwide proved by a preponderance of the evidence that Fraraccio intentionally harmed Elijah, and

iii. Has Nationwide proved by a preponderance of the evidence that Fraraccio physically abused Elijah by intentionally causing Elijah to suffer a physical injury.

If the jury answers any of these questions in the negative, Nationwide will have the duty to defend and indemnify Fraraccio in the underlying state case. Only if the jury answers all three questions in the affirmative will Nationwide have no duty to indemnify and defend Fraraccio.

VI.

For the reasons stated above, and for good cause,

It is hereby **ORDERED** that plaintiff's motion for summary judgment is **DENIED**.

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia
October 18, 2017

/s/
T. S. Ellis, III
United States District Judge